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A Plea for More Historical Awareness in Environmental Law

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Jan-Henrik Meyer

A Plea for More Historical Awareness in Environmental Law

The entry to the new *Oxford Handbook of Legal History* entitled »Historical Analysis of Environmental Law« (1001–1016) by David Schorr, an American-trained legal scholar from Israel, hardly represents what one would expect of an encyclopedic article presenting a research field. Schorr does not follow the usual conventions: he neither celebrates major achievements, nor codifies the field's key tenets, let alone defines core and well-established research areas. Instead, Schorr is highly critical. He diagnoses pathologies, criticises gaping gaps and problematic areas of ignorance. In essence, according to Schorr the historical analysis of environmental law – as an area of legal scholarship and practice – is barely existent. Against this backdrop, Schorr makes very broad and sweeping statements about the directions he thinks the field should be going and why.

Schorr ascribes the lack of historical awareness to the apparent novelty of the subject area. Environmental law as a field only emerged in the wake of what already some of the contemporaries self-confidently described as the »environmental revolution« of the early 1970s. In a short span of time, roughly between 1969 and 1973, promoted by international organisations such as the OECD, NATO, the United Nations (UN) and pace-setting governments – notably the United States and Sweden – the environment emerged as a new area of policy and legislation. New institutions such as environmental agencies and ministries were established. Ambitious environmental action programmes were drafted, outlining legislative and administrative measures. The nascent environmental movement first gathered internationally around the UN Conference in Stockholm in 1972. Environmentalists critically observed and pushed these new institutions to make and shape the new environmental law. Consequently, environmental law quickly became a new subfield within government administrations, legal practice, the courts and legal scholarship.

The apparent novelty of environmental law tends to induce environmental lawyers to discount the importance of history, Schorr rightly argues. Not only do environmental lawyers frequently

ignore the longer-term historical legacy, they also tend to forget that conflicts about and regulations concerning the use and abuse of nature and natural resources are not something altogether new. Schorr deplores that practitioners in particular tend to refrain from using history and historical precedent as an »argument«. This is both counter-productive and counterintuitive in the field of law, where arguing with precedent is standard practice, as many non-lawyers were reminded recently when the House of Commons' speaker John Bercow's mobilised 17th-century precedents of parliamentary procedures to fend off a third Brexit vote.

David Schorr is aptly placed to raise such a critique, as he is one of the few specialists of both legal history and environmental law. Schorr's point of departure is thus a plea for a greater historical awareness in environmental law and among environmental lawyers. He convincingly argues that a *longue durée* view of environmental law *avant la lettre* would be extremely insightful. Scholars and practitioners should consider the large body of rules and regulations on nature, property, nuisances, pollution and resources produced long before such norms were actually defined as and subsumed under the new umbrella of »environmental law« in the early 1970s.

Schorr convincingly demonstrates the extent to which legal historical scholarship remains isolated from the burgeoning interdisciplinary field of environmental humanities. He is right in diagnosing a lack of dialogue with environmental history, a growing field in which legal and political aspects of human interaction have always featured prominently. For decades now, environmental historians have analysed legal texts as sources for understanding human use of natural resources, for instance, through forest codes, water laws or human attempts to protect public health through rules for urban sanitation. Such proto-environmental law often dates back to the Middle Ages or the early modern period.

Even environmental history research focusing on more recent decades involves the law: Environmental movements often pressed for legislation or used the courts, for instance, to stop the construc-

tion of nuclear power plants. Indeed, the existing legal scholarship on such issues is largely from the 1980s, when activist lawyers or administrative lawyers specialising on such issues followed up on current developments. Thus Schorr's plea for more mutual awareness and interdisciplinary collaboration between environmental history and legal history – putting together the skills and expertise of both disciplines – is very timely. Such long-overdue cooperation is something also the author of this review is committed to.

Despite all his criticism on the blind spots in legal history's treatment of the longer-term history of what are today considered environmental issues, he has not altogether given up on the field. Schorr diagnoses an incipient trend in legal history to study pre-1970 precursors and notes Karl Boyd Brook's book *Before Earth Day*, which covers the American experience. Schorr deplores that such works only push back the temporal horizon by a few decades, and he flags the need for a reconnection of environmentally interested legal history to larger cross-cutting themes, among them issues of property law and litigation in front of courts, e. g. concerning nuisances and natural resources. He quotes as a highly insightful example recent research on the long-lasting impact of 19th-century debates on legal principles such as precaution, which apparently continued to inform legal thinking in the last decades of the 20th century, a point in history when key principles of environmental law were defined.

Schorr outlines future avenues for research in expanding the scope of environmental legal history – across time and across issues. Legal historians should, for instance, contribute their knowledge and perspectives to environmental history's interests in the »commons« – spaces of shared ownership and usage governed by institutionalised self-regulation. The »commons« raise various issues of law, justice, right and property, change and resistance. Furthermore, forest laws, police regulations, public health law, statutory nuisances, planning and zoning laws are additional fields awaiting legal historical exploration. In such an exercise, connecting to questions of environmental history, as well as social, political and cultural history would be highly productive. Researchers should thus analyse the motivations of lawmakers and interpreters, such as aesthetics, conservation, or public health and safety, but also take into consideration other relevant actors, power relations and specific contexts.

There is a sense of both scholarly and political purpose to Schorr's final plea for a renewed emphasis on legal historical research and to using historical knowledge thus generated as an argument in legal and (thus) political debates. Three issues, he argues, are at stake: First, deepening historical knowledge is necessary and useful to better understand current environmental law. At first sight, his argument about making history relevant seems very convincing. Many political claims, such as the supposed superiority of private (vs. state) regulation, could be put to a test, with the historical record acting as a referee. However, such a view treats history as an ancillary force whose main purpose is to provide empirical evidence to back certain arguments in theoretical and political discussions. Many self-respecting environmental and legal historians would frown upon ascribing history such a role. They would also highlight methodological issues – such as anachronistically applying a clear binary distinction of public vs. private rule-making to pre-modern times, or point to contextual factors that make a comparison across time highly problematic.

Second, Schorr argues that environmental law is special because it explores issues beyond human action, with nature acting as an independent force to take into account. His implicit critique of an overly constructivist understanding of law as a social construction is well taken. Indeed, laws were often made in a context in which certain forces of nature had to be reckoned with, such as floods or siltation. Global environmental history, however, has demonstrated that subsequently such laws were frequently transferred to other places. In such instances, rules from the imperial centre simply ignored the local forces of nature at the periphery, and more often than not lead to problematic environmental consequences. Hence, such insights alert us to the fact that law's indifference to nature comes at a high price.

Such arguments indeed link to what at first sight seem random suggestions for topics that legal historical research on environmental issues should link to, namely empire and capitalism. However, Schorr points to two focus areas that are highly topical in both legal historical and environmental history research – in the context of a continued commitment to global history.

Schorr's rather unusual text is an excellent introduction into a field which indeed still lacks cohesion and structure, but is in many ways a

promising, relevant and still nascent interdisciplinary field. Admittedly, Schorr's overview has certain lacunae. Like many contributions to the handbook, it is largely Anglo-American in its coverage, a shortcoming to which the author himself alludes. This ignorance of European and global examples is all the more surprising given Schorr's past collaborations with German and other European scholars, not to mention his plea for studying empires and global capitalism. Furthermore, Schorr's account could be complemented by an additional

plea for comparative and transnational perspectives as well as an awareness of the role of international organisations as global law-makers, which have become quite influential at all levels of discussion. That said, Schorr's account is a highly commendable, comprehensive and thought-provoking read for anyone interested in both legal and environmental history.

